Supreme Court U. S.
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MICHAEL RODAK, JR., CLERK

80-290

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

RICHARD FIORE,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari.

WILLIE J. DAVIS,
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Boston, Massachusetts 02109.
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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

1. Does a police officer have the right to enter unoccupied premises, which apparently have been burglarized, for the purpose of determining ownership of the premises?

2. If so, would prior information indicating the presence of narcotics in the unoccupied premises necessitate obtaining a search warrant prior to entry?

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RICHARD FIORE,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for Writ of Certiorari.

The petitioner, Richard Fiore, respectfully prays that a writ of certiorari issue to review the judgment of conviction and opinion of the Appeals Court and Supreme Judicial Court of the Commonwealth of Massachusetts entered in this proceeding on June 25, 1980.

Opinion Below.

The opinion of the Appeals Court is reported at Mass. App. Ct. Adv. Sh. (1980) 833, 403 N.E.2d 953. A copy thereof appears in Appendix A. The Supreme Judicial Court declined further appellate review. Mass. Adv. Sh. (1980) 1549 (decided June 25, 1980).

Jurisdiction.

The judgment of the Supreme Judicial Court was entered on June 25, 1980 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) and Rule 22 of the Rules of the United States Supreme Court.

Constitutional Provisions and Statutes Involved.

UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case.

The petitioner was charged on six indictments with possession of a controlled substance with intent to distribute. He

filed a motion to suppress physical evidence on the ground that entry into the premises was illegal. After an evidentiary hearing the motion was denied. Thereafter, petitioner was tried by jury and convicted on each indictment. He was sentenced to two consecutive terms of two years in the house of correction. He appealed to the Appeals Court which affirmed the conviction. *Commonwealth* v. *Fiore*, Mass. App. Ct. Adv. Sh. (1980) 833, 403 N.E.2d 953. Further appellate review was denied by the Supreme Judicial Court of Massachusetts. Mass. Adv. Sh. (1980) 1549.

The facts material to the consideration of the questions presented are as follows:

Trooper John M. Cauley of the Massachusetts State Police, an officer with more than ten years of experience, was assigned to the Bureau of Investigation Services, Hampden County C.P.A.C. at the District Attorney's office in Springfield in December, 1977 (Tr. 2). Prior to this assignment, trooper Cauley had worked primarily with narcotics in an undercover capacity (Tr. 32).

On December 23, 1977, Officer Getty of the East Longmeadow Police Department called the state police barracks at Monson and left a message for Trooper Cauley (Tr. 9). As a result, Trooper Cauley called Officer Getty (Tr. 6, 9). The two men knew each other and had worked together in the past (Tr. 33).

Officer Getty told Trooper Cauley during the telephone conversation that he (Getty), "had information from an informant that there was a possibility of narcotics, guns and a housebreak at a location near a trailer park, a junk yard and a power line that he thought to be either in the Palmer or Brimfield area." (Tr. 6.) Officer Getty told Trooper Cauley that he (Getty) had never used this particular informant before, but that he believed the informant because he was scared (Tr. 9).

Cauley asked Getty where the informant got his information, but Getty would not tell him (Tr. 10).

After receiving the information from Getty, Cauley contacted his superior, Lt. Fitzgibbon (Tr. 10). Thereafter, Cauley proceeded to the Monson barracks where he met Robert Quarry, Thomas Duffy, and Sergeant Kennedy of the state police. He also met Chief Milani of the Brimfield Police Department (Tr. 11). Later, Trooper Fitzgibbon of the state police joined them (Tr. 12). All of the men then proceeded, "to a vicinity near a power line, near a junk yard" in the Town of Brimfield (Tr. 12-13). The men came upon a cottage at a location previously given to Cauley by Getty (Tr. 13-14). There were no signs of life in the cottage, and no lights (Tr. 15).

Cauley approached the cottage and shined his flashlight around the outside of the building. At this time he noticed that the outside door was broken open (Tr. 16). At this point Cauley decided to enter the building; he did not knock (Tr. 17). He looked to see if anyone was inside, but found no one (Tr. 18).

Once inside the cottage Cauley made certain observations which included a hole in the floor. By shining the light down in the hole he observed a substance which he determined to be hashish (Tr. 24). This determination was made solely by the odor which was not apparent to Cauley until he looked in the hole (Tr. 24).

Cauley, after making the observations in the hole, applied for a search warrant the next day (Tr. 25-26). In the affidavit executed by Cauley in connection with the application for the search warrant, he stated that he had information from Getty about a possible breaking and entering at the cottage. The affidavit did not state the other information Cauley received about the cottage, i.e., the possibility of narcotics and guns being found therein. However, Cauley proceeded to the location of the cottage because of the information received from

Getty concerning the possibility of narcotics being in the cottage (Tr. 39-40).

Upon receiving the search warrant the cottage was searched and a large quantity of a substance suspected of being hashish was seized.

The search of the Brimfield cottage produced some locks (Tr. 43). Prior thereto Cauley had found a slip of paper on the floor. It was a bill addressed to the petitioner Fiore, at 26 Smith Avenue, East Longmeadow (Tr. 22-23). As a result of finding the locks at the Brimfield cottage, Cauley applied for a search warrant to search the East Longmeadow premises (Tr. 43-44). His purpose was to try and find keys which would fit the locks found at the Brimfield cottage (Tr. 44). While searching the East Longmeadow premises Cauley found narcotics which resulted in other indictments being sought against the petitioner (Tr. 44).

In filling out a complaint sheet which is filed at state police headquarters in Boston, Cauley stated that the nature of the complaint was, "information received re: large quantity of hashish secreted in a cabin located in Brimfield." (A. 21.) The complainant's name as given on the complaint sheet was Officer Getty, and his address was given as the East Longmeadow Police Department (A. 21).

Cauley appeared before the grand jury in connection with this matter. He was asked the nature of the information he had which led him to seek the warrant for the Brimfield cottage. He responded that the information was that there was a large quantity of hashish located at a dwelling house (Tr. 30-31).

Reason for Granting the Writ.

THE CONSTITUTIONAL ISSUES HERE PRESENTED HAVE NOT HERETOFORE BEEN DECIDED BY THIS COURT, AND THEY ARE OF GREAT SIGNIFICANCE.

A. *The Initial Entry Into the Brimfield Cottage Violated the Petitioner's Fourth Amendment Right to be Secure From Unreasonable Searches and Seizures in That the Entry was Made Without a Warrant and Without Justification by Reason of Exigent Circumstances.*

The Fourth Amendment to the United States Constitution proscribes all unreasonable searches and seizures. Its purpose is to safeguard the privacy and security of individuals against arbitrary and unreasonable invasions by government officials. *See Schmerber* v. *California*, 384 U.S. 757, 767 (1966). Its cardinal principle is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions. *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978).

Petitioner contends that the initial entry into the Brimfield cottage by Trooper Cauley constituted a search in violation of his Fourth Amendment rights. The search was made without a warrant.

The initial entry into the Brimfield cottage does not fall within recognized exceptions to the warrant requirement. This was not a search incident to an arrest, *cf. United States* v. *Robinson*, 414 U.S. 218 (1973); nor a stop and frisk, *cf. Terry* v. *Ohio*, 392 U.S. 1 (1968). The object of the search was not an automobile or moving vehicle, *cf. Chambers* v. *Maroney*, 399 U.S. 42 (1970), and the police were not in hot pursuit of a fleeing felon, *cf. Warden* v. *Hayden*, 387 U.S. 294 (1967); nor

had Trooper Cauley secured the consent of the petitioner to a search of the premises. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). It might be said that the search was made in order to seize evidence or contraband subject to removal or destruction, *cf. Schmerber* v. *California*, 384 U.S. 757 (1966), but this exception to the Fourth Amendment's warrant requirement was not claimed by Trooper Cauley as the reason for his entry.

Trooper Cauley's affidavit recited that his purpose for entering the dwelling was to, "ascertain who the owner was." There is no authority which supports including such a purpose as an exception to the warrant requirement.

In its opinion, the Appeals Court refused to read Cauley's affidavit so restrictively as to exclude a legitimate entry to investigate a housebreak, and held that the possibility that someone in the cottage was in need of help or that an intruder was in the dwelling, justified Cauley's entry and investigation.

B. *There is no Constitutionally Recognized General "Emergency" Exception to the Fourth Amendment's Warrant Requirement. Even if so Broad an Exception Were Approved, the Total Circumstances Surrounding the Initial Entry into the Brimfield Cottage do not Justify Dispensing With the Constitutional Requirement of a Warrant.*

Apparently the Appeals Court's opinion rests upon the so-called "emergency" exception. *See United States* v. *Dunavan*, 485 F.2d 201 (6th Cir. 1973). Certain decisions of this Court have intimated that response to an emergency could be an exigent circumstance. *See Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951); *McDonald* v. *United States*, 335 U.S. 451, 454 (1948). However, petitioner contends that by their very nature, all exigent cir-

cumstances amount to an emergency. To now label an exception to the Fourth Amendment's warrant requirement the "emergency exception" is to subsume all the existing, restrictively applied exceptions to the rule, and to create an exception so broad as to swallow the Fourth Amendment's warrant protection.

Moreover, petitioner contends that there was no emergency in the circumstances of the initial entry into the cottage, either on the basis of already established emergency-like exceptions, or on the basis of a broad-based concept of emergency. It is clear that the recognized limited exceptions to the warrant requirement (noted above) are inapplicable here. Nor do the facts here support the Appeals Court's notion that there could have been persons in need of aid or intruders still in the cottage when Cauley and the other police officers arrived. There was no sign of life at the cottage (Tr. 15). Indeed, Trooper Cauley found no one inside when he looked (Tr. 18). In fact, there was no degree of urgency connected with Trooper Cauley's investigation at all. Trooper Cauley did not immediately proceed to the vicinity when Officer Getty of the East Longmeadow Police Department told him that, "there was a possibility of narcotics, guns and a house break at a location near a trailer park, a junk yard and a power line that he thought to be either in the Palmer or Brimfield area." (Tr. 6.) Nor did Cauley suggest to Getty that the local authorities should immediately investigate the housebreak, as is probably the routine (A. 10). Instead, Cauley contacted his superior officer, Lieutenant Fitzgibbon, and proceeded to the state police barracks at Monson to meet other police officers and await Trooper Fitzgibbon (Tr. 12). Only then did Cauley and the other police officers proceed to a vicinity, which by the uncertainty of its description of location, presumably took some time finding.

A claim of exigency cannot be evaluated without considering the circumstances in their totality. *Commonwealth* v.

Forde, 367 Mass. 798, 801 (1975). An evaluation of the total circumstances in the instant case does not support any claim of exigency based upon the emergency of aiding someone in the cottage in need of help or apprehending an intruder.

C. *The Asserted Reason for Searching the Cottage Without a Warrant and the Justification for the Search Arrived at by the Appeals Court are, When Considered Within the Total Circumstances Surrounding the Entry Pretextual Rather Than Real.*

To be sure, a large number of state and federal courts have recognized an "emergency" exception to the Fourth Amendment. *See*, "The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment," 43 Fordham L. Rev. 571 (1975). However, recognizing that the emergency doctrine has been applied to a multiplicity of fact patterns, one author has extracted from the cases an exhaustive definition:

> Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, *and provided, further, that they do not enter with an accompanying intent to either arrest or search*. Mascolo, "The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment," 22 Buffalo L. Rev. 419, 426 (1972). (Emphasis added.)

It is this last proviso that renders Trooper Cauley's entry illegal should an emergency doctrine be held applicable here. This is not an instance where the police, hearing screams, knocked at a door and demanded entrance to investigate. *United States* v. *Barone*, 330 F.2d 543 (2d Cir. 1964), *cert. denied*, 377 U.S. 1004. Nor does this case involve highly suspicious circumstances which strongly indicated that unless ownership was immediately ascertained, the object of the search would be gone in the time it took to secure a search warrant. *Commonwealth* v. *Haefeli*, 361 Mass. 271 (1972). Rather, petitioner contends that this is a case in which the police officers entered the premises not to investigate a breaking and entering and not, at least initially, to ascertain the owner of the premises, but with the intent to search for the contraband that had been reported to be present at a burglarized cottage in the vicinity. Only upon discovering the hashish did ascertainment of the owner of the cottage become important to the officers.

Thus, even if an entry into a private dwelling for the purposes of rendering aid, apprehending intruders, or investigating the occurrence of a felony, is considered a valid "emergency" exception to the warrant requirement, that exception would be inapplicable here. Petitioner contends that any of those reasons for Trooper Cauley's entry into the Brimfield cottage are pretextual and not real. *United States* v. *Dunavan*, 485 F.2d 201 (6th Cir. 1973). *Pruitt* v. *State*, 389 S.W.2d 475 (Tex. Crim. App. 1965). Support for the petitioner's claim of pretext can be found within the motion judge's findings of fact on the motion to suppress; Trooper Cauley proceeded to the location of the cottage because of the information received from Getty concerning the possibility of narcotics being in the cottage (Tr. 39-40; A. 20). Trooper Cauley had police experience primarily in undercover narcotics operations (A. 19). In filling out a complaint sheet which is filed at state

police headquarters in Boston, Cauley stated that the nature of the complaint was, "information received re: Large quantity of hashish secreted in a cabin located in Brimfield." (A. 21.) Cauley and his fellow officers were not interested in investigating a housebreak; they were admittedly there to find narcotics. Hindsight should not now color the true purpose of the entry into the cottage, nor allow pretextual grounds to make reasonable an entry made for purposes of an illegal search. *United States* v. *Martinez-Fuerte*, 420 U.S. 543 (1976).

D. *The Informant's Tip Which Led the Police to the Brimfield Cottage did not Provide Probable Cause to Make A Warrantless Entry.*

The search of the Brimfield cottage was indeed illegal; not only was there no exigency justifying the entry, but also there was no probable cause to support a search of the premises. Since the informant who originally supplied the tip to Officer Getty of the East Longmeadow Police Department had never been used in the past, he was not reliable (Tr. 9). And Getty refused to inform Trooper Cauley of any of the circumstances from which the informant concluded that there were narcotics in the Brimfield cottage (Tr. 10). Thus, the two-pronged test of *Aguilar* v. *Texas*, 378 U.S. 108, 114 (1964), was not met in either particular. It might be said that upon locating a cottage which had been broken into in the general vicinity given by the informant, the police had corroboration of the tip which could amount to probable cause to search. *Spinelli* v. *United States*, 393 U.S. 410 (1969). Since there had been no exigency requiring immediate entry and sufficient police personnel to secure the premises, a warrant should have been obtained at that point.

E. *The Evidence Seized From the Brimfield Cottage Should Have Been Excluded at Trial as the Product of an Illegal Entry; and Evidence Seized in East Longmeadow Should Have Been Excluded Because it was Fruit From the Poisonous Tree.*

A search unlawful at its inception is not validated by what it turns up. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968). It follows that having observed what he suspected of being on the premises as a result of a warrantless and illegal entry, Trooper Cauley could not use that information in later seeking to obtain a warrant to search the cottage. And, because the warrant to search the Brimfield cottage was invalid, the warrant to search the premises in East Longmeadow, which was obtained as a result of what was found in Brimfield, is also invalid. *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

Petitioner's convictions of possession of controlled substances with intent to distribute were based upon evidence which should have been excluded as seized in violation of the search and seizure provisions of the Fourth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Therefore, the decision of the Appeals Court affirming the judgments of conviction was in error.

Conclusion.

The response to the questions presented should be answered by this Court in the negative. In *Michigan* v. *Tyler*, 436 U.S. 499 (1978), the basic purpose of the Fourth Amendment, i.e., to safeguard the privacy and security of individuals against arbitrary invasions by government officials, was reaffirmed. In *Tyler*, it was held that fire victims retain Fourth Amendment

protections in whatever remains of their property. Of course, it was explained that fire and police officials faced with the exigency of a fire in progress have a duty to enter without a warrant and, having entered during the emergency, they may remain on the premises for a reasonable time. But the mere fact that a fire has occurred does not suspend Constitutional protections until the suspected arsonist has been apprehended and the premises restored. Likewise, the fact that premises have apparently been burglarized does not mean that police officials can enter at will.

The instant case does not involve a breaking and entering in progress, which could be analogized to a burning building, requiring an immediate warrantless entry. The record indicates that there was a mere possibility that a breaking and entering had occurred. The record indicates no exigency, a fact conclusively demonstrated by the actions of the police officers themselves. The police did not respond as if to an emergency, i.e., no officers were immediately dispatched to the cottage.

No right of entry accrued to the police, because no exigent circumstances were present. Therefore, the petition for writ of certiorari should issue.

Respectfully submitted,

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS.

HAMPDEN, SS. SUPERIOR COURT
Nos. 78-217 through
78-227

COMMONWEALTH

vs.

RICHARD FIORE
AND
DEBORAH TRACY

Findings and Rulings.

The Motion to Suppress is DENIED.

Findings of Fact.

1. Trooper John M. Cauley of the Massachusetts State Police, an officer with more than ten years of experience, was assigned to the Bureau of Investigation Services, Hampden County C.P.A.C. at the District Attorney's Office in Springfield in December 1977. (Tr. 2). Prior to this assignment, Trooper Cauley had worked in an undercover capacity, primarily with narcotics. (Tr. 32).

2. On December 23, 1977, Officer Getty of the East Longmeadow Police Department called the State Police Barracks at Monson and left a message for Trooper Cauley. (Tr. 9). As a result, Trooper Cauley called Officer Getty. (Tr. 6, 9). The

two men knew each other and had worked together in the past. (Tr. 33).

3. Officer Getty told Trooper Cauley during the telephone conversation that he (Getty) "had information from an informant that there was a possibility of narcotics, guns and a house break at a location near a trailer park, a junk yard and a power line that he thought to be either in the Palmer or Brimfield area." (Tr. 6). Officer Getty told Trooper Cauley that he (Getty) had never used this particular informant before, but that he believed the informant because he was scared. (Tr. 9). Cauley asked Getty where the informant got his information, but Getty would not tell him. (Tr. 10).

4. After receiving the information from Getty, Cauley contacted his superior, Lt. Fitzgibbons. (Tr. 10). Thereafter, Cauley proceeded to the Monson Barracks where he met Robert Quarry, Thomas Duffy and Sergeant Kennedy of the State Police. He also met Chief Malangi of the Brimfield Police Department. (Tr. 11). Later, Trooper Fitzgibbons of the State Police joined them. (Tr. 12). All of the men then proceeded "to a vicinity near a power line, near a junk yard" in the town of Brimfield. (Tr. 12-13). The men came upon a cottage at the location previously given to Cauley by Getty. (Tr. 13-14). There were no signs of life in the cottage and no lights. (Tr. 15).

5. Cauley approached the cottage and shone his flashlight around the outside of the building. At this time he noticed that the outside door was torn off. (Tr. 16). At this point Cauley decided to enter the building; he did not knock. (Tr. 17). Upon entering through the doorway where the door had been torn off, Trooper Cauley found the inner door to be ajar. (Tr. 17). He looked to see if anyone was inside, but found no one.

6. Once inside the cottage, Cauley made certain observations which included a hole in the floor. By shining his light

down in the hole, he observed a substance which he determined to be hashish. (Tr. 24). This determination was made solely by looking in the hole and by an odor which was not apparent to Cauley until he looked in the hole. (Tr. 24). On his way out, Cauley noticed a slip of paper on the floor of the dwelling. It was a bill addressed to a Mr. R. Fiore, 26 Smith Avenue, East Longmeadow, Massachusetts. (Tr. 22-23). The East Longmeadow address is a home owned by Robert and Antionette Fiore. (Tr. 46). The Brimfield cottage is also listed to a Robert and Antionette Fiore.

7. After making the observations in the hole, Cauley applied for a search warrant the next day. (Tr. 25-26). In the affidavit executed by Cauley in connection with the application for the search warrant, he stated that he had information from Getty about a possible breaking and entering at the cottage. The affidavit did not state the other information Cauley received about the cottage, i.e., the possibility of narcotics and guns being found therein. However, Cauley proceeded to the location of the cottage because of the information received from Getty concerning the possibility of narcotics being in the cottage. (Tr. 39-40).

8. Upon receiving the search warrant, the cottage was searched, and a large quantity of a substance suspected of being hashish was seized.

9. The search of the Brimfield cottage produced some locks. (Tr. 43). Prior thereto, Cauley had found a slip of paper on the floor. It (F. 6) was a bill addressed to the defendant Fiore at 26 Smith Avenue, East Longmeadow. As a result of finding the locks at the Brimfield cottage, Cauley applied for a search warrant to search the East Longmeadow premises. (Tr. 43-44). His purpose was to try to find keys which would fit the locks found at the Brimfield cottage. (Tr. 44). While searching the East Longmeadow premises, Cauley found narcotics

which resulted in other indictments being sought against the defendants. (Tr. 44).

10. In filling out a complaint sheet which is filed at State Police Headquarters in Boston, Cauley stated that the nature of the complaint was "information received re: large quantity of hashish secreted in a cabin located in Brimfield." (Exh. 1). The complainant's name as given on the complaint sheet was Officer Getty, and his address was given as the East Longmeadow Police Department. (Exh. 1).

11. Cauley appeared before the Grand Jury in connection with this matter. He was asked the nature of the information he had which led him to seek the warrant for the Brimfield cottage. He responded that the information was that there was a large quantity of hashish located at a dwelling house. (Tr. 30-31).

Rulings of Law.

1. The defendants have standing to challenge the search of the premises involved.

2. The initial entry into the Brimfield, Massachusetts cottage by Trooper Cauley was a legal entry under the circumstances.

Although Trooper Cauley had been investigating a breaking and entering in the area, because of the broad description given to him, he had no reason to believe at this point that this was the cottage about which he had been informed. (Tr. 22). Upon finding a dwelling with the front door torn from the hinges and the second door ajar, Cauley surely had a duty to make some investigation. *Commonwealth* v. *Thomas*, 358 Mass. 771, 774 (1971). It was reasonable in the instance for Cauley to think that there might have been someone hiding in the dwelling (Tr. 22) who could escape or who might further

damage the property. He had a duty to secure the property for the owner. Also, upon viewing the violent way in which the house was broken open, it would have been reasonable to believe that someone might be injured and in need of assistance. Leaving the scene under these circumstances to obtain a search warrant would have been unreasonable and contrary to his official duty.

3. There was no misstatement, intentionally or otherwise, made by Trooper Cauley in his affidavit for the search warrant.

It is clear that Cauley had more information about the Brimfield premises than he included in his affidavit. But it does not follow that the inclusion of such additional information would have destroyed the probable cause for the search warrant to issue. The failure to include the information that the Brimfield cottage probably contained narcotics and firearms is not misrepresentation.

RAYMOND R. CROSS
Justice of the Superior Court

Entered:

Appendix B.

Hmdn. 79-170

COMMONWEALTH *vs.* RICHARD FIORE.

GOODMAN, J. The defendant appeals (G.L. c. 278, §§ 33A-33G) from convictions on six indictments charging possession of controlled substances with intent to distribute. He assigns as error and argues in the following order (1) the denial of his motion to suppress evidence which, he contends, resulted from an illegal search and seizure; (2) the trial judge's refusal to ask certain questions of prospective jurors; (3) the denial of his motions for directed verdicts; and (4) the admission of certain testimony at trial. (Other assignments of error not argued are deemed waived.)

1. *Motion to suppress.* The following background facts appear primarily from the judge's findings on the motion to suppress, supplemented by the evidence introduced at the hearing on the motion. At about 10:00 P.M., on December 23, 1977, an officer of the East Longmeadow police department (Getty) spoke over the telephone to a State police trooper (Cauley) and told him that he (Getty) had received information "from an informant that there was a possibility of narcotics, guns and a house break at a location near a trailer park, a junk yard and a power line that he thought to be either in the Palmer or Brimfield area."[1] Later that evening, Cauley, together with members of the State Police and the chief of the Brimfield police department, proceeded "to a vicinity near a power line, near a junk yard" in the town of Brimfield (see note 1, *supra*).[2] There they came upon a cottage, the outside door of which

[1] The quotation, included in the judge's findings, is taken from Cauley's testimony at the hearing.

[2] There was also a trailer park in the area.

was torn off. Cauley entered through the doorway and found the inner door to be ajar. He looked to see if anyone was inside but found no one. In the cottage, Cauley noticed a hole in the floor and shone his flashlight into the hole, where he saw and smelled a quantity of hashish. The next day he applied for and received a warrant to search the Brimfield cottage; the police seized cocaine and a large quantity of hashish, various bills, notebooks, papers and miscellaneous paraphernalia. As a result, Cauley then obtained a warrant to search the defendant's East Longmeadow residence; that search resulted in the seizure of more narcotics, as well as keys to the locks on the cellar door of the cottage.[3]

The defendant contends that Cauley's observation of the hashish in the Brimfield cottage is the fruit of an illegal entry, and that this is manifest (a) on the face of the affidavit in support of the search warrant (*Commonwealth* v. *Monosson*, 351 Mass. 327 [1966]) and (b) from the evidence at the hearing on the motion to suppress. We do not agree.

(a) Cauley's affidavit recites that, as a result of information from Getty concerning a breaking and entering in a dwelling house in Brimfield, Cauley and other officers went to that dwelling house and found that "there had been in fact a break committed there." They "entered the dwelling house . . . to ascertain who the owner was." The affidavit further sets out that while in the cottage Cauley noticed "a quantity of . . . hashish."

It seems clear to us that a house break without more — as set out in the affidavit — raises the possibility of danger to an occupant and of the continued presence of an intruder and indicates that need to secure the premises. In such circumstances "[t]he right of the police to enter and investigate in an emergency without the accompanying intent to either search

[3]No separate issue is raised with reference to the East Longmeadow warrant.

or arrest is inherent in the very nature of their duties as peace officers." *United States* v. *Barone*, 330 F.2d 543, 545 (2d Cir.), cert. denied, 377 U.S. 1004 (1964). *Warden* v. *Hayden*, 387 U.S. 294, 298-300 (1967). *Michigan* v. *Tyler*, 436 U.S. 499, 509-510 (1978). *Commonwealth* v. *Thomas*, 358 Mass. 771, 774 n.2 (1971). *Commonwealth* v. *Kingsbury*, Mass. App. Ct. , - ,[a] *S.C.*, Mass. (1979).[b] See *Marshall* v. *United States*, 422 F.2d 185, 187-189 (5th Cir. 1970); *United States* v. *Dunavan*, 485 F.2d 201, 204-205 (6th Cir. 1973). The defendant points out, however, that the entrance in this case was stated in the affidavit to be in order "to ascertain who the owner was." We do not read the affidavit so restrictively as to exclude the normal motivations in entering a dwelling when the police discover a break. *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965).[4]

(b) The defendant further contends that Cauley's observation of the hashish in the cottage was the fruit of an illegal entry made for the purpose of looking for narcotics, rather than the inadvertent result of the investigation of a breaking and entering. See *Commonwealth* v. *Forde*, 367 Mass. 798, 807-808 (1975), citing *Wong Sun* v. *United States*, 371 U.S. 471, 484-488 (1963), *Commonwealth* v. *Penta*, 361 Mass. 894, 895 (1972), and *Commonwealth* v. *Hall*, 36[6] Mass. 790, 795 (1975). The issue, otherwise put, is the applicability to Caul-

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[a] Mass. App. Ct. Adv. Sh. (1979) 180, 181-182.

[b] Mass. Adv. Sh. (1979) 2149.

[4] The defendant also complains that Cauley omitted from his affidavit any reference to the additional information received from Getty about the possibility that narcotics might be found in the cottage. But in our view, as explained in part (b) *infra*, this possibility did not make unlawful the entry into the cottage; therefore its inclusion in the affidavit would have been immaterial. See *Franks* v. *Delaware*, 438 U.S. 154, 161-164 (1978); *Commonwealth* v. *Reynolds*, 374 Mass. , - (1977) (Mass. Adv. Sh. [1977] 2817, 2822-2824).

ley's observation of "[t]he plain view doctrine [which] requires prior police justification for an intrusion in the course of which an officer inadvertently comes across incriminating evidence. The 'prior justification' language is merely another way of articulating the necessity for 'some . . . legitimate reason for being present unconnected with a search directed against [an] accused.' *Coolidge* v. *New Hampshire* [403 U.S. 443, 466 (1971)]." *Commonwealth* v. *Walker*, 370 Mass. 548, 557 (1976).

On the record in this case we believe the entry was justified. To be sure, Cauley testified that he came upon the cottage in the course of an investigation of the possibility of narcotics in a house which might have been broken into and that Getty's information, on which he proceeded, came from an informant for whose reliability neither Cauley nor Getty could vouch.[5] In view of the uncertainty of the information, the trial judge could, as he did, believe Cauley's testimony that when he came upon the cottage from which the door had been torn, he did not know that this was the cottage to which Getty's informant had referred. From the testimony, Cauley had no physical description of or any other information as to the specific cottage involved; there are "numerous cottages in the area." Cauley was obviously looking for the cottage which he ultimately entered, but it was just happenstance that he went in the direction of that cottage.[6] Further, there were tracks in

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[5]Cauley testified that on questioning Getty he was told that Getty had never used this informant before and that when Cauley "asked him what did he base his reliability on . . . he told me that the informant was very scared and he tended to believe him." Getty would not tell Cauley where the informant got the information.

[6]He testified: "I went through a trailer park where there was numerous places. There were some up behind it and I went up a dirt road. I b[ore] to the right. You could have b[orne] to the left and I think the[re] are cottages up in there. I came upon a cottage." He further testified: "I came upon a dwelling that was obviously broken into. I did not know . . . if it was the

the snow leading to the cottage, and there was an automobile parked in the yard.

In the circumstances the possibility that this was the cottage where narcotics might be found did not cancel out the alternate possibility that someone in the cottage was in need of help or that an intruder was in the dwelling. Cauley was not obliged to treat the cottage as somehow an outlaw without the right to police protection and aid because of the possibility that there might be narcotics in it. That mere possibility did not require him to depart from the normal procedure that "if we came upon a break we go in and ascertain if anybody who had broken in was still inside." Accordingly, the motion to suppress was properly denied.

2. *Voir dire of prospective jurors.* Of the seventeen questions which defense counsel proposed that the trial judge ask prospective jurors, the judge asked six. In view of the representations of counsel that there had been "a lot of publicity" when the case began a little less than a year previously, the judge agreed to ask defense counsel's proposed question addressed to the possible exposure of the venire to such publicity.[7] He thus complied with G. L. c. 234, § 28, as amended through St. 1975, c. 335, which requires the examination of prospective jurors "if it appears that as a result of the . . . possible ex-

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same place that Mr. Getty had talked to me about . . . . I went in to ascertain if anybody was inside there who had broken in, to secure the property for the owner and to identify the owner, if at all possible.

[7] The proposed question was: "Do you have any knowledge of this case gained from any source including but not limited to radio, television, newspapers or in conversation with other prospective jurors?

a. If so, have you formed an opinion about the case?

b. If you have not formed an opinion but have knowledge of the case, can you decide the issues solely on the evidence presented at trial?"

He also asked as proposed by defense counsel: "Do you have any special feelings about narcotics which will make it difficult for you to decide this case upon the evidence alone?"

posure to potentially prejudicial material . . . the juror may not stand indifferent." We see no reason to interfere with the judgment of the trial judge in refusing to ask additional questions dealing with such general topics as a defendant's right not to testify and the presumption of innocence. The trial judge apparently saw no sufficient relation between whatever "extraneous considerations" the publicity might have engendered and those questions, which arise at every trial and which are, as the trial judge indicated, dealt with in the charge to the jury. The trial judge necessarily has a large measure of discretion to decide just how to frame the questions in applying the statute. See *Commonwealth* v. *Campbell*, Mass. , - (1979);[c] *Commonwealth* v. *Jones*, Mass. App. Ct. , - ,[d] further appellate review granted, Mass. (1980).[e]

3. *Motions for directed verdict.* Contrary to the defendant's contention, there was sufficient evidence when the defendant moved for a directed verdict at the end of the Commonwealth's case from which the jury could find beyond a reasonable doubt that the defendant had dominion and control over the narcotics seized in the Brimfield cottage. Three trunks of marihuana were found in the cellar, the windows of which were welded shut with metal plate and the heavy door to which was secured by two dead-bolt Yale locks. The keys to these locks were in the possession of the defendant when the police went to his East Longmeadow home. Further, in his bedroom in East Longmeadow they found books of account with reference to sales of marihuana and under his bed three jars, the numbers on which correlated with numbers in notebooks found in the Brimfield cottage. The search of the Brim-

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[c] Mass. Adv. Sh. (1979) 2055, 2074-2076.

[d] Mass. App. Ct. Adv. Sh. (1980) 153, 163-165.

[e] Mass. Adv. Sh. (1980) 917.

field cottage also yielded a number of papers and bills addressed to "Mr. Richard Fiore, 26 Smith Avenue, East Longmeadow," where Richard Fiore lived and a number addressed to Richard Fiore with directions to the Brimfield cottage. We need not analyze each piece of evidence; together, we are convinced, they presented a jury question as to the control and possession of the narcotics in the Brimfield cottage. See *Commonwealth* v. *Dinnall*, 366 Mass. 165, 169 (1974); *Commonwealth* v. *Rugaber*, 369 Mass. 765, 769-770 (1976); *Commonwealth* v. *Xiarhos*, 2 Mass. App. Ct.. 225, 231-232 (1974); *Commonwealth* v. *Lee*, 2 Mass. App. Ct. 700, 702-705 (1974).

4. *Admission of evidence.* Cauley's expert testimony as to the "street value" of cocaine and hashish was admissible. The trial judge was well within his discretion in qualifying Cauley as an expert (*Commonwealth* v. *Boyd*, 367 Mass. 169, 182 [1975]) and the testimony was obviously relevant to the defendant's intent to distribute. See *Commonwealth* v. *Baltrop*, 2 Mass. App. Ct. 819, 820 (1974); *Commonwealth* v. *Rivera*, Mass. App. Ct. (1978).[f] See also cases cited in *Opinion of the Justices*, Mass. n.4 (1979).[g] We find unconvincing the defendant's argument in his brief based on points made on cross-examination going to the weight of the testimony. His further objection to the evidence of the correlation between the numbers on the jars found in the defendant's East Longmeadow home and the notations in notebooks in the Brimfield cottage is insubstantial.

Judgments affirmed.

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[f] Mass. App. Ct. Adv. Sh. (1978) 1129.

[g] Mass. Adv. Sh. (1979) 1781, 1788 n.4.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

NO. 80-290

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

RICHARD FIORE,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR RESPONDENT IN OPPOSITION.

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I.

ISSUES PRESENTED.

1. Was the police officer's warrantless entry into the cottage, after receiving information of a possible breaking and entry in the area and observing indications of a forced entry a reasonable search under the Fourth Amendment to the Constitution?

2. Was the police officer's subsequent observation of hashish within the "plain view" exception to the Fourth Amendment to the Constitution?

PARTIES.

The Commonwealth of Massachusetts and Richard Fiore are the sole parties to this action.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent accepts petitioner's citation of opinions below, statement of jurisdiction under 28 U.S.C. § 1257(3) (1976), statement of the constitutional provision involved, and the statement of the case.

REASONS FOR DENYING THE WRIT.

I. THERE IS NO SUBSTANTIAL CONFLICT BETWEEN THE MASSACHUSETTS APPEALS COURT AND OTHER STATE OR FEDERAL COURTS AS TO A POLICE OFFICER'S WARRANTLESS ENTRY INTO A BUILDING IN AN EMERGENCY.

The petitioner has not attempted to show any substantial conflict between the decision of the Massachusetts Appeals Court and other state or federal courts. Petitioner's failure to show any substantial conflict reflects the uniform position of state and federal courts that a police officer may properly enter a dwelling without a search warrant in response to an emergency situation. See cases collected in Mincey v. Arizona, 437 U.S. 385, 392 n.6 & 7 (1978); See generally LaFave, Search and Seizure, §6.6(b); Mascolo, The Emergency Doctrine Exception

to the Warrant Requirement Under the Fourth Amendment, 22 Buffalo L. Rev. 419 (1972); Note, The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment, 43 Ford. L. Rev. 571, 584 n.102 (1975).

II. THE ISSUES PRESENTED ARE NEITHER NOVEL NOR SIGNIFICANT.

The Massachusetts Appeals Court determined that Trooper Cauley's entry was in response to the report of a house break in the area, and indications of a forced entry into the cottage. The court was emphatic in its conclusion, "[i]t seems clear to us that a house break without more -- as set out in the affidavit -- raises the possibility of danger to an occupant and of the continued presence of an intruder and indicates the need to secure the premises." Commonwealth v. Fiore,

Mass. App. Ct. Adv. Sh. (1980) 833, 835, 403 N.E.2d 953, 954-55 (1980).

The right of police officers to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in their duties as peace officers. United States v. Barone, 330 F.2d 543, 545 (2d Cir. 1964), cert. denied, 377 U.S. 1004 (1964). In very similar circumstances, entry into a building after report of a burglary and indications of forced entry, the Sixth Circuit upheld a police officer's warrantless entry, United States v. Estese, 479 F.2d 1273 (6th Cir. 1973). See also, Zamper v. Dist. Ct., ____ Mont. ____ , 591 P.2d 656 (1979) (police entry after neighbor's report of burglary and finding door ajar); People v. Hardin, 54 Mich. App. 353, 220 N.W.2d 785 (1974) (police entry after neighbor reports lights

within house whose occupants are on vacation); People v. Parra, 30 Cal. App. 3d 729, 106 Cal. Rptr. 531 (4th Dist. 1973), cert. denied, 414 U.S. 1116 (1973) (police entry after discovering an open door to an unattended shop).

The general proposition that police officers may make a warrantless entry in an emergency was strongly presented by then Judge Burger concurring in Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963), cert. denied, 375 U.S. 860 (1963).

> [A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

See, Mincey v. Arizona, 437 U.S. 385, 392-93, nn.6 & 7 (1978); Michigan v. Tyler, 436 U.S. 499, 509-10 (1978); Warden v. Hayden, 387 U.S. 294, 298-300 (1967).

III. PETITIONER'S ARGUMENT IS FUNDAMENTALLY A DISPUTE CONCERNING THE FACTUAL FINDINGS OF THE CASE.

On the motion to suppress the Superior Court determined that: (1) Trooper Cauley had no reason to believe that the cottage he entered was the one the informant had referred to; (2) upon finding a dwelling with the front door torn off and the inside door ajar, the trooper had a duty to investigate and secure the property; and, (3) it was reasonable for the trooper to think there was someone hiding in the dwelling or that someone might be injured. Commonwealth v. Fiore, Sup. Ct. No.

78-217-227, Ruling of Law #2. The petitioner contested these conclusions in the Appeals Court and lost. The Appeals Court agreed that "the trial judge could, as he did, believe Cauley's testimony that when he came upon the cottage from which the door had been torn, he did not know that this was the cottage to which [the] informant had referred." Commonwealth v. Fiore, Mass. App. Ct. Adv. Sh. (1980) 833, 836; 403 N.E.2d 953, 955 (1980). The Appeals Court also agreed that, "[i]n the circumstances the possibility that this was the cottage where narcotics might be found did not cancel out the alternate possibility that someone in the cottage was in need of help or that an intruder was in the dwelling." Commonwealth v. Fiore, Mass. App. Ct. Adv. Sh. (1980) 833, 837,

403 N.E.2d 953, 956 (1980). The Massachusetts Supreme Judicial Court declined further appellate review of the case. Commonwealth v. Fiore, Mass. Adv. Sh. (1980) 1549. The petitioner now, presents the same basically factual arguments concerning the intent of the trooper on entering the cottage.[1/] This Court should not grant certiorari to review the evidence and discuss once more the intent of the trooper on entering

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1/Petitioner argues, "Nor do the facts here support the Appeals Court's notion that there could have been persons in need of aid or intruders still in the cottage . . ." Petition For Writ of Certiorari, at 8, and "this is a case in which the police officers entered the premises not to investigate a breaking and entering and not, at least initially, to ascertain the owner of the premises, but with the intent to search for the contraband that had been reported to be present at a burglarized cottage in the vicinity." Petition For Writ of Certiorari, at 10.

the cottage. United States v. Johnston, 268 U.S. 220, 227 (1925) (J. Holmes).

IV. THE MASSACHUSETTS APPEALS COURT APPLIED THE APPROPRIATE ANALYSIS.

Once it is determined that the trooper's initial entry into the cottage was reasonable, the trooper's subsequent observation of hashish was within the plain view doctrine. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). It is well settled that an object in plain view of an officer who lawfully is in a position to have that view is subject to seizure. Harris v. United States, 390 U.S. 234 (1968). Thus, the Massachusetts Appeals Court properly upheld the seizure of the hashish.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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